Council Highlights

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View From the NFTC Chair

By Alan Wm. Wolff, NFTC Chairman

There is more art than science involved in closing a deal. That is a lesson learned from a mentor of mine. The Tokyo Round of Multilateral Trade Negotiations was still stalled when newly-minted U.S. Trade Representative (USTR) Robert Strauss made his first trip to Brussels to meet with the European Commission (EC). Bob had no trade experience. He had been Chairman of the Democratic National Committee. He actually had very little interest in the substance of what we were doing – he had deputies and the professional staff at what is now USTR to deal with that. But in fact, it was what he added that did not come from his deputies or our staff that moved things forward. He understood people, and he could learn quickly what was possible and what was not. What he excelled at was delivering a successful outcome.

In his first meeting with the Europeans, he told them that day needed to end with a press conference. Why? He stunned EC officials by announcing that he would "praise them or denounce them" depending on the outcome of their meeting. This was pure Texan. But he also told the Europeans that he did not seek to destroy the Common Agricultural Policy. He knew that goal was unreachable. The eagle on a trade ambassador's flag has arrows in one claw and an olive branch in the other. Bob was artful in his tough love diplomacy. The folks across the table became lifelong admirers, just as the Chair of the Republican National Committee, one George H.W. Bush, did despite their being at odds on who should govern the country.

In the end, the first nontariff barriers ever to be approved by the Congress were included in the package. These were the Government Procurement Agreement, the Standards Code (Agreement on Technical Barriers to Trade) and the Customs Valuation Code. The package of agreements provided far-reaching liberalization.

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A Word From the President

By Bill Reinsch, NFTC President

There were a lot of high-fives and backslaps this past summer after Congress finally passed Trade Promotion Authority (TPA), along with extensions of *African Growth and Opportunity Act* and Generalized System of Preferences and sundry other things. As you know, it was a long, hard, difficult fight where the Administration and the business community faced an exceptionally well-organized and determined opposition that proved particularly adept at mobilizing grassroots opponents. Why that was so will be the subject of another piece at another time. Suffice it to say at this point that it was a difficult fight, and it will not get any easier in the future.

Today's comment, however, is about the future, not the past, however recent. While we can congratulate ourselves on getting an important job done, it would be a mistake to assume that we are now finished and can take some time off and focus on other things. In fact, the trade agenda remains a long one with a number of time-sensitive items. In other words, vacation is over, and we have to get back to work.

The first and most urgent item on the table is reauthorization of the Export-Import (Ex-Im) Bank. I've written before about what an incredible, self-inflicted wound elimination of the Bank would be. In a global economy where all our major competitors have an export financing facility, to disarm unilaterally is simply to give jobs away at the very time we badly need them. Those who want to eliminate the Bank are often the same people who are quick to argue that the nation needs to maintain a strong defense militarily, yet they fail to see that a strong economic defense is equally important.

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1625 K Street, NW, Suite 200
Washington DC, 20006-1604
Phone: (202) 887-0278 | Fax: (202) 452-8160

A Word From the President

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There is clearly a bipartisan majority in both the House and the Senate to renew the Bank, and the next opportunity to do so arrives at the end of September with the need to enact appropriations, or a continuing resolution, to keep the government functioning. The Administration has asked Congress to include reauthorization of the Bank in the continuing resolution, and that is something we should all be working hard to support.

There are also leftovers from this summer's trade battles. The customs bill remains in conference and needs to be finished. Parts of it have attracted some controversy, particularly the currency provision, but that's what a conference is for – to work through the difficulties and produce a version that will attract broad support. This bill was part of the overall deal that led to enactment of TPA, and it's important to get it across the finish line as well. We should be encouraging the two committees to finish the work of reconciling the two different versions of the bill and then support the final product.

While those are the most urgent, they're not the only things on the list. Others, however, require considerably more ambition like cybersecurity legislation that facilitates rather than blocks trade and the long overdue immigration reform that has so roiled the presidential debate.

We also need to be preparing for the inevitable fight over Trans-Pacific Partnership (TPP) implementing legislation. While the agreement is not yet completed, all signs indicate that it will be and in time for the current Congress to vote on it well before the end of next year. As you know, much of the TPA debate was really about TPP, so we should expect strong opposition to it. Business will have several advantages in that debate that it did not have this summer. First, we know the arguments that will be used, and we know how to counter them. Second, the agreement will be public well before it is voted on, so the "secret agreement" argument should fade away. Third, those on the right who opposed it because they didn't want to give the President more authority won't have that argument to make. Fourth, the agreement will, we all hope, promise tangible benefits in terms of improved market access and better rules for farmers, manufacturers and service providers. Those "winners" will need to stand up and defend the agreement because we know the "losers" – and there will be some – will be doing their best to defeat it.

Of course, the trade agenda is not limited to congressional action. Major negotiations are underway as well, and we have a role to play in encouraging governments to keep pushing them forward, Sisyphean though that task may be. While restarting the Doha Round remains mired in the same disagreements that stalled it seven years ago, it looks like the expanded Information Technology Agreement will be concluded thanks to agreement this summer on the products that will be covered. Likewise, the Environmental Goods Agreement continues to make impressive progress. Both promise significant advantages for U.S. manufacturers, and they are efforts the NFTC has strongly supported. Hopefully, one or both of these will be ready for the Nairobi World Trade Organization Ministerial meeting this December. The Trade in Service Agreement continues to make progress as well, though it is not likely to conclude this year.

Regionally, we also have the Transatlantic Trade and Investment Partnership negotiations, which have lagged a bit for a variety of reasons, one of which is the United States' preoccupation with TPP, something which will change once the latter is finished. These are every bit as important as TPP and already have business's strong support, but they will likewise need defending in Congress. Some of the opposition arguments will be new, but many will be the same ones we have been fighting for years.

This is not a complete list by any means, but even by itself it is a compelling reminder that despite our success this summer, there is much more work to be done.

"A Word From the President" is written by NFTC President Bill Reinsch. If you have questions or comments, please forward them to breinsch@nftc.org.

View From the NFTC Chair

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Congress approved the negotiated results by a vote of 395-7 in the House and 90-4 in the Senate. Of course, this led to some later second guessing by armchair negotiators. Why wasn't more done? For example, why didn't the deal result in the phase-out of textile and apparel quotas? Counterfactual questions about the Carter Administration's trade deal have no certain answers. A lot was accomplished, and there was enough left over for future negotiations to address.

Zeno's paradox – that if one cuts the distance in half repeatedly, one never closes a gap fully – does not apply to trade negotiations. Get close enough and a deal can be closed. In the U.S.-Canada free trade agreement negotiations, a sticking point was that the Canadians set a very high priority on getting an exemption from U.S. countervailing duty law. That was not possible. Sam Gibbons, then Chair of the Trade Subcommittee of the House Ways and Means Committee, suggested to Jim Baker, then Secretary of State, a novel extra-constitutional approach: Make domestic trade enforcement decisions reviewable not by the courts but by bi-national panels. That proposition helped clear the way for North American integration.

The most difficult point in the Uruguay Round was reducing the level of European Union agricultural protection. Domestic reform (an element that is key to success in Trans-Pacific Partnership (TPP), as well) paved the way for concluding the Round. Europe agreed to move from high domestic price support levels in the direction of direct payments to farmers. Further, Europe agreed to place limits on its agricultural export subsidies. Solving these issues allowed a number of vital improvements in the world trading system to be put into place, including the first agreements on services and intellectual property, as well as creation of the missing institution in global economic cooperation, the World Trade Organization.

What is left on the table for TPP trade ministers (and even heads of state) to resolve are only the hardest issues. That is to be expected in any negotiation. To be addressed are: sugar and dairy access to the U.S. market; dairy, poultry and eggs into the Canadian market; rice and other commodities into Japan; adequate intellectual property protection for pharmaceuticals; rules of origin for autos and auto parts; and preferences in Malaysia for Malays – to name a few of the remaining areas that stand out. One TPP trade minister recently briefed his public that 27 out of 30 TPP chapters are closed. We are at the point that trade ministers, yet again, have to prove that Zeno's paradox does not apply to international trade negotiations.

Ambassador Alan Wm. Wolff is a Senior Counsel of the International Trade Practice at Dentons US LLP and is the Chairman of the NFTC Board of Directors.

Focus on State Sanctions on Iran

By J. Dan O'Flaherty, Vice President, doflaherty@nftc.org

The NFTC and USA*Engage have long opposed individual state's foreign policy sanctions on companies doing business in target countries. The NFTC has twice won major federal court decisions which struck down state sanctions laws. In 2000, the Supreme Court ruled unanimously in *Crosby v. NFTC* that a Massachusetts law prohibiting the state from purchasing goods and services from companies doing business in Burma was preempted by sanctions enacted by the federal government which had "occupied the field" by imposing sanctions at the national level. In so doing, the Court upheld a First Circuit Court of Appeals decision which also held that the Massachusetts law infringed on the federal foreign affairs power and violated the foreign commerce clause of the Constitution. In 2007, the Federal District Court for the Northern District of Illinois held in *NFTC v. Alexi Giannoulias* that Illinois's sanctions law requiring state pension fund divestment from companies doing business in Sudan violated the foreign commerce clause of the Constitution. There is consequently a substantial body of federal jurisprudence establishing the primacy of the federal government in imposing foreign policy sanctions.

In spite of this jurisprudence, state legislatures have continued to enact foreign policy sanctions measures. The NFTC has routinely written governors and legislators to remind them of federal court decisions. Nonetheless, some states have continued to enact foreign policy sanctions which include requirements that public pension funds divest from companies doing business in target countries and also that mandate procurement bans on companies doing business in those countries.

In recent years, at least 30 states have enacted divestment requirements on companies doing business in Iran. In many cases, the state laws cite the 2010 *Federal Comprehensive Iran Sanctions Accountability and Divestment Act* (CISADA) as giving them authority for public pension fund divestment. Eleven states, however, have enacted bans on public procurement from companies doing business in Iran which CISADA does not address and which the Crosby decision unambiguously prohibits.

This raises the question of how these state sanctions can be reconciled with the recent nuclear agreement with Iran. Eleven state divestment or procurement laws have no sunset provision, while the remainder expire under certain conditions. These include Iran's removal from the list of state sponsors of terrorism, a presidential finding that the state statute interferes with the federal government's ability to conduct foreign policy, repeal of CISADA, and/or a certification by the President or Congress that Iran is no longer pursuing weapons of mass destruction and/or nuclear weapons.

The July Joint Comprehensive Plan of Action (JCPOA) reached by the United Nations Security Council (P5) and Germany (P5+1) in July with Iran commits the international community to lift nuclear-related sanctions on Iran as the agreement is implemented. In fact, several elected officials have doubled down by saying that they will not only oppose repealing state sanctions on Iran but will seek to expand them. The NFTC and USA*Engage will closely follow these developments and continue our long standing opposition to legislation of this kind, litigating it again if necessary.

Ex-Im: Job Losses Keep Growing

By Bill Reinsch, NFTC President, breinsch@nftc.org

On September 15, *POLITICO* featured two expected news developments:

1. "*General Electric announced today that it is moving 500 U.S.-based jobs to France, Hungary and China in order to secure export credit financing from foreign export credit agencies, pointing to the expiration of the U.S. Export-Import Bank as the crucial factor.*"

2. *Boeing said it was informed by a Singapore-based broadband satellite operator that it can't consider the U.S. aircraft maker's bid on a satellite contract without Ex-Im financing.*"

These were not the first such announcements, and they won't be the last. It should be becoming apparent to everyone that the United States is going to suffer enormous economic damage from a self-inflicted wound – the expiration of the Ex-Im Bank's charter. The Bank's opponents have argued that its services are redundant and that the private sector will step in to finance the exports formerly backed by the Bank. We are now faced with tangible evidence that that is simply wrong.

International markets are not seamless, and they do not operate the way the economics textbooks tell us they should. Particularly in the wake of the 2008 financial crisis, banks have dropped out of the export finance business. In the case of large or long-term projects, like power plant construction or mainframe aircraft, it has been a long time since private banks were prepared to provide financing without a government guarantee, which has long been one of the Bank's important functions. This means that official export credit institutions like Ex-Im Bank do not supplant the market; they fill in its gaps.

For more than 70 years, Ex-Im Bank did that effectively; so effectively that now virtually all our competitors have similar institutions competing with ours. And that is what makes shooting ourselves in the foot so serious. Our companies have to survive in a world of cutthroat and often unfair competition. When the U.S. government unilaterally disarms, it is U.S. companies and U.S. jobs that suffer as our competitors step in to fill the space we have abandoned.

As I said in the beginning, these announcements are not going to be the last ones. Jobs will continue to disappear from our shores as we lose contracts or as companies move offshore to take advantage of financing available elsewhere. At a time of slow economic growth, it is hard to think of a more obvious policy mistake. It is clear that a majority in both the House and the Senate understand this and favor renewing the Bank's charter. Hopefully they will find a way to do so before more jobs are lost.

Public Policy and FDI

By J. Dan O'Flaherty, Vice President, doflaherty@nftc.org

A primary objective of public commercial diplomacy is to facilitate foreign direct investment (FDI) on the presumption that increased FDI brings macroeconomic benefits, especially to developing economies, e.g., economies of scale, technology transfer, the spread of best practices and increased efficiency in enterprises and utilization of natural resources. In service to this conviction, public policies, such as investment chapters in free trade agreements, bilateral investment treaties and the Overseas Private Investment Corporation, which facilitate U.S. investment in developing economies, intend to encourage, protect and support FDI by American companies.

Economists agree that the greatest benefits of FDI to emerging markets accrue from greenfield investments, which not only constitute a capital infusion, but also result in net new job creation, increased tax revenues to host governments, and in many cases increased exports and more positive balance of payments. So the protections included in international investment agreements and the support programs intend to reassure and encourage greenfield FDI in developing countries.

In fact, however, most recent FDI has been in mergers and acquisitions (M&A) by large multinational companies based both in developed and developing countries. United Nations Conference on Trade and Development's (UNCTAD) 2015 World Investment Report documents that greenfield FDI projects in developing countries declined in 2014. At the same time, M&A deals increased by 34 percent over the previous year, amounting to $900 billion, considerably larger than the annual average of $775 billion in the previous five years. Notably, the individual deals were among the largest on record – the number of deals for more than $1 billion grew to 223 from 168 the year before. But most of this activity – 77 percent to be exact – took place among developed economies. The UNCTAD report attributes this to multinational companies' increased willingness to use their significant reserves and retained earnings to buy up companies in other Organisation for Economic Co-operation and Development (OECD) countries. The UNCTAD study concludes that "over the last 10 years the announced value of greenfield projects from developed economy multinational companies (to developing economies) has been essentially flat."

Well, so what does that mean? UNCTAD, for one, finds this trend distressing: "In light of the important role that FDI is expected to play in financing development, the current subdued trend is of concern. Policymakers may wish to consider concerted action to push for increased productive investment for sustainable development." In other words, OECD governments should find ways to increase private direct investment in developing countries. It seems fair to conclude that UNCTAD has accurately identified a trend based on an incentive structure that OECD governments – and certainly not the United States at this point – are very unlikely to change. That's really too bad since responsibility for global economic growth is increasingly ceded to the private sector and concerted multilateral action is increasingly hard to come by. FDI trends are, therefore, just another indicator of the difficulty of commercial governance in a globalized world.

Process and Prospects for U.S. Companies Under the JCPOA with Iran

*By Richard Sawaya, Vice President, USA*Engage, rsawaya@nftc.org*

On September 15, USA*Engage and NFTC hosted State Department Sanctions and Counter Threat Financing Deputy Assistant Secretary Andrew Keller and Acting Director, Office of Foreign Assets Control (OFAC), John Smith to discuss the process and prospects for U.S. companies as the Joint Comprehensive Plan of Action (JCPOA), concluded between Iran and the P5+1.

As they made clear, if the JCPOA is implemented, an OFAC general license will set forth, what, if any, commerce beyond the status quo U.S owned or controlled foreign subsidiaries may pursue with Iran.

Summary

JCPOA "adoption day" is October 18. On that date, Iran begins to do all that is required to circumscribe its nuclear program and answer for its past military-related nuclear activities. The International Atomic Energy Association (IAEA) is the body responsible for compliance verification.

When verification is complete, and the IAEA certifies that Iran has met all JCPOA requirements, "implementation day" is reached. It is estimated that the time between adoption day and implementation day will be six to nine months.

On implementation day, all "nuclear-related sanctions" will be lifted/suspended, that affect all non U.S. persons outside U.S. jurisdiction and certain U.S. persons with respect to Iranian civil aviation and Iranian exports of foodstuffs and carpets.

Regarding the ability of U.S. controlled foreign subsidiaries to do business with Iranian entities after implementation day, OFAC "will have the pen." The primary sanctions on U.S. persons doing business with Iran will remain, as well as any other U.S. sanctions in force because of Iran's sponsorship of terrorism and internal human rights abuses.

The JCPOA provision of "sanctions snapback," should Iran be found to fail to observe its commitments, would not be retroactive, but also would not include any grandfathering of contracts.

OFAC will provide written guidance prior to implementation day regarding U.S. secondary sanctions with respect to entities remaining on the Specially Designated Nationals list. To repeat, U.S. persons will still be generally prohibited from doing business with Iran.

The "contours" of a general license to address what business U.S. owned or controlled subsidiaries may do with Iran, "consistent with the JCPOA," have not been specified.

Specific licenses will address the civilian aircraft space. A general license will address import of carpet and foodstuffs. These will be completed before implementation day.

If snapback occurs, all entities doing business with Iran must be ready to stand down.

In the world of U.S. policymaking, (the Executive and Congress) there is no appetite to move away from the primary U.S. sanctions on Iran, and there is a good chance there may be new sanctions focused on Iran's terrorism.

State and OFAC welcome any and all questions as they work to formulate a general license. OFAC prefers all communications in writing. Email is fine. State is more flexible to take in-person meetings with individual companies. Comprehensive comment – "non-paper papers"– are also welcome.

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Process and Prospects for U.S. Companies Under the JCPOA with Iran

*By Richard Sawaya, Vice President, USA*Engage, rsawaya@nftc.org*

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The Administration is working closely with the European Union and other countries on all sanctions issues.

Regarding what U.S. foreign subsidiaries are allowed, there will be a lot of due consideration given to the question of "passive facilitation." The conclusion is likely to disappoint, as "creep" cannot be allowed. Latitude cannot be expected. Specific licenses, case by case, may be the fallback for both businesses and OFAC. The more specific "what ifs" submitted, the better.

Pre-positioned license applications – that is, submitted before implementation day – may be an attractive alternative for both businesses and OFAC.

Again, broad investment by U.S. companies in Iran is not on the table. While the United States will not try to undermine non U.S. company investment in Iran, a common understanding of "snapback" does exist between the United States and the European Union that includes no grandfathering.

The Administration is open to suggestions beyond the parameters of the JCPOA for trade-related activities between U.S. persons and Iran that are in the policy interests of the United States (e.g., "people to people" exchanges).

In general, the more information, fact-specific in nature, the business community can provide during the next few months will be welcome at State and OFAC. There will be no formal notice given calling for such.

Action Plan

The issue of how the divestment and procurement laws focused on Iran that have been adopted by various states will comport with JCPOA implementation is anyone's guess. USA*Engage and NFTC will focus on this issue, as we have in the past, including successful litigation at the Supreme Court.

USA*Engage and NFTC have always argued a global economy with global goods and services supply chains necessitates that sanctions – whatever their justification – have to be multilateral to have any hope of success. It would seem obvious that the reverse is true; that the rescission of sanctions should be multilateral and honor parity. That will not be the case, obviously.

Ironically, congressional opponents of the JCPOA have cited the "undercutting of American entrepreneurs and businesses" by the agreement.

We encourage all member companies to take State and OFAC at their word.

We will also work with interested members and other interested parties to develop a robust and timely submittal to State and OFAC.

If you have any questions, please contact Richard Sawaya, Vice President, USA*Engage, rsawaya@nftc.org.

New Report Highlights European Entrepreneurs Participating in Global Markets

By Jake Colvin, Executive Director, Global Innovation Forum, jcolvin@nftc.org

This summer, the Global Innovation Forum produced a new report, *European Startups: Global from the Get-Go*, which examines how European startups have the opportunity to become global brands from day one.

Via profiles of 10 entrepreneurs across Europe – from the founder of a digital sheet music platform in Belgium to an online custom suit maker in Bulgaria – the report highlights the global opportunities for European startups and small businesses to be global from their launch.

Innovators also identify and suggest how to address policy issues that impact their ability to do business, including: customs and value-added taxes; compliance with foreign regulations; cultural and language challenges; access to the global Internet; and payments and currency.

“Digital technologies are enabling unparalleled access to the global marketplace, but entrepreneurs emphasize that an opportunity exists to facilitate their global journeys further and improve prospects for more communities in Europe and around the world,” the report observes.

“Entrepreneurs suggest that governments have an important role to play in supporting access to the global marketplace and removing the remaining pain points that they identified. They stress that policymakers can craft rules to lessen friction by lowering tariffs where they exist, improve access to global services, financing and digital platforms, develop better visa and immigration processes, guarantee reliable access to the global Internet, simplify customs procedures, and make more information more easily available and understandable.”

GIF Hosts Salons in Berlin, Brussels, London and Paris

By Jake Colvin, Executive Director, Global Innovation Forum, jcolvin@nftc.org

In July, NFTC's Global Innovation Forum (GIF) hosted salon dinners in Berlin, London and Paris, and a lunch in Brussels to get to know entrepreneurs who are taking their businesses global. The forums used the release of GIF's new report *European Startups: Global From the Get-Go* as an opportunity to convene a broader set of stakeholders, including globally-minded entrepreneurs, members of national parliaments and the European Union Parliament, European Union Commission and national government officials, corporations and startup community partners for small group discussions about the potential and challenges of global markets.

GIF partnered with organizations including the German Startups Association, Coadec, TechUK, Afdel and TheFamily to identify entrepreneurs from across Europe to tell their global stories and to discuss the public policy foundations that underlie their ability to access global markets.

In Brussels, for the official report launch, GIF partnered with Startups.be, Tech.eu and Allied for Startups to host a discussion with The Honorable Kaja Kallas, MEP, Member of the Industry, Research and Energy Committee, Johanna Pangestian Harahap, Co-Founder, Nauli (Germany), Justo Hidalgo, Co-Founder, 24symbols (Spain), Bart Van der Roost, Founder and CEO, neoScores (Belgium) and Leen Segers, Chief Operating Officer at Tech.eu.

Speaking about prospects for the Transatlantic Trade and Investment Partnership, Ms. Kallas suggested that, "we have a lot to gain from international markets. I'm generally of the opinion that this is good for European startups … It's all about taking down barriers."

In Paris, GIF partnered with TheFamily and Afdel to convene innovators, including the co-founder of Azendoo, which simplifies the way teams work together; the founder of Videdressing, a leading community for fashonistas to buy and sell clothes and accessories; Taro Ugen, the manager of Bpifrance's Corporate Hub team; Laure de la Raudière, member of the French National Assembly, where she represents the Eure-et-Loir department; Roxanne Varza, startup lead at Microsoft Ventures Accelerator Paris; and Clara Deletraz, co-founder of the French Tech initiative.

Commenting on the launch of the report in London, Antony Walker, Deputy CEO of techUK, which partnered with GIF on a dinner at the Hoxton in London, said, "This highlights the breadth of innovation and entrepreneurship in tech that is happening right across the EU – from Limerick to Berlin, London to Barcalona, European start-ups have to think global from day 1."

Comments on Some of the Proposed Changes to the U.S. Model Income Tax Treaty

By Catherine Schultz, Vice President for Tax Policy, cschultz@nftc.org

On May 20, 2015, the U.S. Department of Treasury released proposed revisions to the U.S. Model Tax Treaty. Treasury requested comments from the business community with respect to these proposed changes. Many of the proposed changes have been put forth as a result of the base erosion and profit shifting (BEPS) project being finalized at the Organisation for Economic Co-operation and Development (OECD). The U.S. Model Tax Treaty was last updated in 2006. The Model serves as a template for future U.S. tax treaties as protocols. The proposed changes target: (1) expatriated entities, (2) exempt permanent establishments, (3) special tax regimes, (4) the anti-treaty shopping measures of the limitation on benefits (LOB) article, and (5) subsequent changes in treaty partners' tax laws.

The NFTC provided very detailed comments to Treasury on the proposed changes to the U.S. Model Tax Treaty. Here is an abbreviated version of those comments.

General Overview

Tax treaties are a crucial component of the framework that is necessary to allow growth and to promote balanced competition. This is why the NFTC has long supported the expansion and strengthening of the U.S. tax treaty network and why the following comments on the proposed revisions to the U.S. Model Tax Treaty are submitted with a view to considering issues and making recommendations for the future.

Tax treaties are bilateral agreements that serve to harmonize the tax systems of the two countries applicable to companies and other persons involved in cross-border investment and trade. In the absence of a tax treaty, income from cross-border transactions or investment would be subject to potential double taxation, first by the country where the income arises and again by the country of the recipient's residence. Tax treaties eliminate this double taxation by allocating taxing jurisdiction over the income between the two countries.

In addition, the tax systems of most countries impose withholding taxes, frequently at high rates, on payments of dividends, interest and royalties to foreigners. Treaties are the mechanism by which these taxes are lowered on a bilateral basis. If enterprises earning such income abroad cannot enjoy the reduced foreign withholding rates offered by a tax treaty, they are liable to suffer excessive and non-creditable levels of foreign tax and to be at a competitive disadvantage relative to businesses from other countries that do have such benefits. Tax treaties serve to prevent this barrier to participation in international commerce.

Tax treaties also provide other features that are vital to the competitive position of global businesses. For example, by prescribing internationally agreed thresholds for the imposition of taxation by foreign countries on inbound investment, and by requiring tax laws to be applied in a nondiscriminatory manner to nonresident enterprises, treaties offer a significant measure of certainty to potential investors. Another extremely important benefit that is available exclusively under tax treaties is the mutual agreement procedure, to resolve disputes in particular cases or reach bilateral agreement on issues of interpretation or application. This bilateral administrative mechanism avoids double taxation on cross-border transactions.

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Comments on Some of the Proposed Changes to the U.S. Model Income Tax Treaty

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We agree that U.S. tax treaties should use clear rules to minimize tax disputes and incentivize cross-border trade and investment. We are concerned, however, that few of Treasury's proposed changes to the Model further these policy objectives. Rather, the proposed changes would incentivize foreign governments to raise their taxes on income from bilateral trade and investment between the United States and that foreign country, or choose not to reduce the tax burden on such investments even where sound policy would otherwise justify such a reduction. The NFTC does not support this quest. It is not a proper function of U.S. tax treaty policy to ensure that foreign governments collect a certain minimum amount of tax from such bilateral trade and investment. We believe that U.S. tax policy should seek to minimize foreign taxes on U.S. taxpayers (thus, minimizing U.S. foreign tax credits) and maximize the success of U.S. companies doing business abroad. Tax treaties should be focused on finding solutions to the problems created by differences in national tax systems that may lead to double taxation, and not on restraining countries from lowering fiscal burdens to either encourage the inflow of productive resources or discourage the exodus of those resources.

At the same time, Treasury's most recent proposals would have the effect of altering Treasury's role in setting domestic tax policy and expanding its authority vis-à-vis the role of Congress. U.S. lawmakers should not be constrained from enacting legislation that serves their constituents, but Treasury's proposed changes would do just that. By providing for loosely defined broad standards that would automatically trigger a partial or complete loss of treaty benefits, Treasury's proposal would limit the ways in which Congress could reform domestic tax laws in the future. Moreover, the significant ambiguity in these proposals would not only limit U.S. lawmakers in enacting domestic laws, but the scope of those limitations would be left to the myriad interpretations of foreign treaty partners. We do not endorse this approach.

U.S. domestic law imposes income tax on certain U.S. activities of foreign persons and a 30 percent withholding tax on certain U.S.-source payments, and treaty policy necessarily requires decisions with respect to the application of those domestic laws. But treaty policy does not extend to concerns, such as minimum tax rates, special tax regimes, non-conduit base erosion and expatriation transactions (so-called "inversions"). It is NFTC's view that these concerns do not fall within the ambit of treaty policy, do not belong in bilateral income tax treaties and should not be undertaken without the endorsement of Congress.

Comments on Specific Areas of Proposal

1. Special Tax Regimes

Treasury's proposal with respect to special tax regimes amply illustrates the aforementioned concerns. This proposal would disallow certain treaty benefits where a taxpayer's residence state offers a tax preference (no matter how great), which disproportionately benefits interest, royalties or other income (no matter to what extent), unless one of several narrow exceptions applies. As you are aware, the NFTC has long supported a zero withholding rate on interest, dividends and royalties in the bilateral tax treaties. The provision would also hamstring Congress from enacting anything that a foreign tax official might deem to be a special tax regime since the result would be for the U.S. taxpayer to be assessed with additional foreign taxes. For example, if Congress sought to enact a "patent box" or "innovation box" that did not, in the view of a treaty partner, meet the substantial activities test set forth in the treaty, taxpayers would have to bear additional foreign taxes as a penalty for taking advantage of those incentives.

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Comments on Some of the Proposed Changes to the U.S. Model Income Tax Treaty

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Congress would be similarly inhibited from enacting other tax policies not currently being contemplated but which may become desirable in the future. Simply put, the overriding issue is that tax treaties should not be used to artificially constrain which tax laws Congress can enact – and yet that is exactly the result that would follow should the Treasury proposal be implemented.

The proposal, however, goes even further than Treasury proscribing Congress from enacting domestic tax legislation. Because the provision relates to the denial of treaty benefits with respect to foreign taxes, it is up to the foreign treaty partner to determine whether a U.S. law constitutes a special tax regime. Thus, the proposal arrogates to foreign governments the authority to determine the propriety of domestic tax legislation enacted by Congress. We are greatly concerned that the U.S. check-the-box rules could be considered a special tax regime by a foreign treaty partner. We fail to see how such a concession of authority could possibly be in the U.S. national interest.

Additionally, the ambiguities inherent in the proposed special tax regime provision expand foreign governments' incursions upon U.S. lawmakers' ability to legislate domestic tax law by creating a penumbra of doubt over U.S. laws that a foreign tax authority may interpret as constituting a special tax regime. This penumbra would grow with each new treaty ratified because, although one treaty partner may conclude that a U.S. law does not constitute a special tax regime, a new treaty partner may harbor different views of whether U.S. laws constitute special tax regimes. These views could even change over time. Treasury's technical explanation of the provision asserts that no current U.S. law constitutes a tax preference, but it is merely Treasury's interpretation and is not binding on a treaty partner.

Moreover, the technical explanation grants no such assurance against future U.S. laws. Even if the United States and a treaty partner were to agree on an exclusive list of special tax regimes, it provides no protection for future U.S. laws unless the exclusive list applies to all present and future laws (in which case the definition of a special tax regime becomes superfluous, calling into question its initial rationale).

Finally, the proposal violates fundamental principles that always have been the foundation of U.S. and international treaty policy. Tax treaties serve (i) to promote outbound trade and investment by providing greater certainty with respect to a U.S. person's tax obligations on business profits and by reducing foreign withholding taxes on withholdable payments, and (ii) to promote inbound trade investment by providing reciprocal benefits. The proposed special tax regimes provision, however, discourages outbound trade and investment by denying treaty benefits where the United States chooses to reduce its effective tax rate on foreign-source income and discourages inbound trade and investment by denying treaty benefits where a treaty partner chooses to reduce its effective tax rate on U.S.-source income. Indeed, the consequence of this provision is to encourage foreign governments to raise or maintain high levels of taxation on U.S. taxpayers, often at the expense of the United States through increased foreign tax credits. Treasury's scarce and valuable resources should not be expended for the purpose of enriching foreign governments.

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Comments on Some of the Proposed Changes to the U.S. Model Income Tax Treaty

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2. Subsequent Changes in Law

The proposal with respect to subsequent changes in law raises similar policy concerns as the proposal with respect to special tax regimes. Under the subsequent changes in law proposal, a foreign treaty partner would be empowered to cease providing treaty benefits with respect to dividends, interest, royalties and other income if the United States reduced its generally applicable rate of taxation to below 15 percent, either directly or by changes in the tax base, or if the United States adopted a territorial system of taxation which exempted foreign income from U.S. tax. There is no reason to believe the U.S. Senate would ever ratify a treaty containing such a restraint on future U.S. tax legislative policy.

This provision once again limits the options of present and future lawmakers for enacting domestic tax law by arming foreign governments with a sword to use against U.S. taxpayers when Congress takes certain actions. Although recent legislative proposals from members of Congress and the President have not proposed that the United States reduce its generally applicable rates of taxation to below 15 percent, or adopt a territorial system that exempts foreign income, it is not the role of tax treaties to inhibit any such future consideration. The subsequent changes in law provision would weaken those subsequent legislative proposals by attaching a treaty penalty to them. As mentioned above, the NFTC does not believe U.S. tax treaties should be used as a manner by which to constrain U.S. lawmakers' ability to enact tax legislation.

3. Exempt Permanent Establishments

Like the subsequent changes in law proposal, the proposed provision to exempt permanent establishments operates on the assumption that the United States will never adopt a territorial system which exempts foreign income from U.S. tax. This reasoning fails to acknowledge that a foreign income exemption system is simply an alternative to a foreign tax credit system in addressing double taxation through domestic law. As a result, the exempt permanent establishment's provision arbitrarily chooses the credit system as an acceptable method of eliminating double taxation and the exemption system as an unacceptable method of eliminating double taxation. This choice may be fruitful to the United States now, while U.S. law employs a credit system, but the NFTC again doubts whether any U.S. Senate would ever ratify a treaty that forever limits Congress's ability to switch to an exemption system in the future.

4. Expatriated Entities

Although Treasury's proposals with respect to expatriated entities differ from those discussed above, our concern remains the same. Congress set forth very specific rules in section 7874 with respect to how expatriated entities are to be taxed. In doing so, Congress could have chosen to deny certain expatriated entities treaty benefits, but it declined to do so. Lawmakers continue to offer amendments to section 7874 and, to date, none of these amendments would deny treaty benefits to expatriated entities. Moreover, at no point has Congress authorized, or even proposed to authorize, Treasury to determine on its own accord what additional penalties may be lodged against expatriated entities outside the scope of its current regulatory authority. This is a place where Congress has legislated and continues to consider legislation. Treasury should not attempt to enact its own policy through bilateral income tax treaties that may persist unchanged for decades to come.

The NFTC believes all U.S. taxpayers should pay their fair share of U.S. taxes. But, it is Congress's prerogative to determine what a U.S. taxpayer's fair share is by amending the Internal Revenue Code, not Treasury's prerogative to do so by amending bilateral tax treaties on a piecemeal basis.

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Comments on Some of the Proposed Changes to the U.S. Model Income Tax Treaty

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5. Limitations on Benefits

The proposed changes to the limitations on benefits article (LOB) of the Model address a different consideration: treaty shopping. Anti-treaty shopping provisions ensure the treaty objective of reciprocity is achieved by limiting treaty benefits to persons with sufficient nexus to a resident state. The NFTC continues to believe that anti-treaty shopping provisions that are narrowly tailored to this goal serve an important purpose in U.S. tax treaties. This is why the NFTC applauds the proposed addition of a derivative benefits test to the Model, uninhibited by geographic restrictions that bear no relation to treaty shopping.

Nevertheless, several of the proposed changes to the Model's LOB overreach and fail to recognize the complex organizational structures that arise in today's complex business environment. For example, the proposed derivative benefits, ownership base erosion and public company subsidiary tests would impose intermediate owner restrictions that fail to address any treaty shopping concern not already addressed by base erosion tests and anti-conduit rules. These new restrictions would deny treaty benefits to structures implemented for non-tax business reasons that arise from acquisitions, regional holding structures aimed at aligning business reporting hierarchies and tiered structures arranged to facilitate third-party financing and improve intragroup liquidity. Similarly, precluding holding companies from qualifying under the active trade or business test solely with respect to income related to business conducted in the country of residence unfairly penalizes companies that cannot qualify under the derivative benefits test (e.g., many privately held companies) without addressing any specific treaty shopping concern. We encourage Treasury to consider these comments and others from the business community as it refines the U.S. Model's LOB to ensure the LOB is realistic and pragmatic in light of today's complex business environment where tangled organizational structures are far more likely than the simple paradigms used to illustrate basic concepts of nexus and treaty shopping.

NFTC Releases Survey on Global Short-Term Business Travel

By Bill Sheridan, Vice President, International Human Resources, wsheridan@nftc.org

As the international marketplace and economy continue to grow, more and more American companies are engaging in business abroad, which has led to an increase in global short-term business travel. However, businesses with a global presence face a series of complex visa rules and processes that make business travel more challenging.

Aware of these challenges, in July, the NFTC, in coordination with the Global Immigration Benchmarking Association (IBA) and Berry Appleman & Leiden LLP (BAL), released the results of its 2015 Global Short-Term Business Travel Survey.

The survey included responses from 150 companies on the complexity of visa rules, as well as heightened scrutiny of business travelers. The highlights of the survey results include:

- Of the respondents, 60 percent reported their employees take over 500 international business trips annually.
- One-third of the companies surveyed reported an employee had been denied entry into a country when on short-term business travel.
- Over half of the respondents stated they do not have a formal business visa travel policy.

Additionally, the survey found that companies are worried about a number of risks related to business travel, including violations of tax laws and employees potentially misrepresenting their business travel activities.

The insights from this survey into industry practice when it comes to managing business travel provide a standard against which for companies to benchmark their own policies.

The survey, conducted in May, consisted of 17 questions and was distributed to NFTC, IBA and BAL members with employees who travel internationally for business purposes. Participating companies represent a broad range of industry sectors, from technology to entertainment to hospitality.

For the full survey results, contact Bill Sheridan at wsheridan@nftc.org.

International Human Resource Activities: Fall 2015

By Bill Sheridan, Vice President, International Human Resources, wsheridan@nftc.org

Expatriate Management Committee

The NFTC's Expatriate Management Committee held its Fall 2015 meeting from September 21 to 23 in Phoenix, Arizona. The meeting was hosted by American Express Company. Forty member companies were represented at the meeting. In addition to the usual agenda items on global mobility policy design and administration, the meeting included presentations on:

- Alignment of Global Mobility and Talent Management
- Pension Plans for Globalists
- Preparing For, and Responding to, Emergency Situations
- Survey on Global Mobility Policy

International Assignment Management Committee

The NFTC's International Assignment Management Committee will hold its Fall 2015 meeting from October 10 to 12 in New York City. The meeting will be hosted by International Flavors & Fragrances. Over 30 companies will be represented at the meeting. The agenda will include:

- Non-Traditional Alternatives
- Dual – Career Families: Impact on Global Mobility
- Strategically Integrating Talent Management and Global Mobility
- Immigration and Tax Compliance

International Benefits Committee

The International Benefits Committee will meet in New York City on October 20 at The Yale Club of New York. Thirty-five corporate international benefits and compensation colleagues, as well as subject matter experts from the major international accounting, actuarial, insurance and law firms, will participate. The agenda will include:

- Cross-Border Mergers and Acquisitions: Impacts on Benefit and Compensation Plans
- Report on 2015 Global Wellness Survey Findings
- De-Risking Employer Pension Plans

International Compensation and Benefits Committee

The NFTC's Houston-based International Compensation and Benefits Committee will hold its semi-annual meeting at The Houstonian Hotel on November 12. Over 30 companies will participate in the meeting. The agenda will include:

- De-Risking Employer Pension Plans
- International Total Rewards Management
- Pension and Savings Plans in the Oil and Gas Industries

2015 Global Mobility Trends Survey

In October, the NFTC will release the findings of the 2015 Global Mobility Trends Survey conducted with Cigna Global Health Benefits. The 2015 survey is an update on the one conducted in 2013 and had over 2,500 responses from expatriates working in over 50 countries. This survey follows the approaches taken in 2013, 2001 and 2000 by gathering information directly from assignees. It will be of interest to see how expatriates currently view the support provided by their employers with regard to their careers, assignment packages, pre-assignment planning, communications, health care access during assignment and career planning.

Marketing and Business Development

By James Wilkinson, Vice President for Strategy and Growth, jwilkinson@nftc.org

The World Trade Dinner will be held on October 15, 2015, in the Liberty Ballroom of the Marriott Marquis Washington, DC. This is the chic and stylish new convention center headquarters hotel. Building on the glamour of the Centennial dinner last fall, the dinner this year will feature a cocktail hour, cabinet-level speakers, great prizes and take-home bags for all attendees.

Our World Trade Award honoree this year is United States Trade Represenative Michael Froman for his career in advancing open markets and rules-based global trade. The past 12 months in particular have seen some great accomplishments by Ambassador Froman as he won Trade Promotion Authority for the President and brought the Trans-Pacific Partnership negotiations to endgame.

For World Trade Dinner table sponsorship packages or individual tickets, please contact NFTC Vice President James Wilkinson at jwilkinson@nftc.org.

Board of Directors Activity

As usual, the NFTC Board of Directors will meet earlier the same day as the World Trade Dinner, and will meet at the Marriott Marquis in the Mint Room, across the hall from the dinner venue. On the agenda are some budget matters and a guest speaker. Just prior to the Board Meeting will be the Annual Meeting of the Members, at which Board Members are elected. The NFTC Foundation Board will meet earlier in the day, as well.

In Case You Missed It...

NFTC Hosts Discussion on TTIP Ahead of Malmström Visit

On September 18, in advance of European Union Trade Commissioner Cecilia Malmström's visit to Washington, DC, NFTC hosted a discussion on the Transatlantic Trade and Investment Partnership negotiations, focusing on the key bilateral trade and investment issues, such as regulatory cooperation and investment. The conversation was led by Sean Heather, Vice President at the Center for Global Regulatory Cooperation and Executive Director of International Policy and Antitrust Policy at the U.S. Chamber of Commerce and Ambassador Alan Wolff, Chairman of NFTC. NFTC President Bill Reinsch and NFTC Vice President for Regional Trade Initiatives Chuck Dittrich provided additional perspective.

NFTC Hosts Discussion with AmCham on Business in China

On September 10, NFTC, together with the American Chamber of Commerce in Shanghai (AmCham Shanghai), hosted a roundtable discussion of the business climate for U.S. companies in China. The discussion covered a range of issues – from expectations for the Xi visit, to the importance of enhancing U.S. export competitiveness to creating American jobs, to specific challenges faced by U.S. companies in China. Robert Theleen, Chair of AmCham Shanghai and Chairman & CEO of ChinaVest, and Kenneth Jarrett, President of AmCham Shanghai, led the discussion, and NFTC President Bill Reinsch offered additional thoughts.

ICYMI: NFTC's Colvin Recaps Trip to Cuba

In case you missed it, NFTC Vice President for Global Trade Issues Jake Colvin recapped his trip to Cuba in a blog post where he discusses the five main takeaways from his trip, including his observations on opportunities for American businesses and entrepreneurs.

For the full post, visit: https://medium.com/@Colvin_Jake/what-i-learned-in-cuba-d8adff9fe198

NFTC and SUA Co-Host Media Teleconference on Sugar Market Access

Last month, NFTC and the Sweetener Users Association (SUA) hosted a media teleconference to discuss sugar market access in the context of the ongoing Trans-Pacific Partnership negotiations. Guest speakers included Warren Males, Head – Economics for the Australian CANEGROWERS and Dominic Nolan, Chief Executive Officer of the Australian Sugar Milling Council, who shared their perspectives on the negotiations and granting Australia additional access to the U.S. sugar market. SUA President Rick Pasco and NFTC President Bill Reinsch provided additional perspective.

NFTC Chairman Comments on China's Currency Devaluation in Fortune

In August, in a column in *Fortune*, NFTC Chairman Alan Wolff discussed the implications of China's currency devaluations on world trade, specifically as the issue relates to TPP negotiations. Excerpt: "*China is not a part of the TPP negotiations, but the trade deal has an open architecture — other countries can negotiate accession to the agreement any time after the current 12 participants conclude the deal. For this reason, and because there was Congressional concern voiced last Spring over currency manipulation during consideration of trade legislation, China's action has freshened the focus on the linkage of currency values to trade. The subject is controversial. There is no international (or domestic) agreement on what constitutes currency manipulation.*"

For the full article, visit: http://fortune.com/2015/08/19/what-chinas-currency-devaluation-means-for-theworlds-trade-deals/

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National Foreign Trade Council
Email: nftcinformation@nftc.org
www.nftc.org

Washington DC Office
1625 K Street, NW, Suite 200
Washington, DC 20006
Phone: 202-887-0278
Fax: 202-452-8160

New York Office
60 East 42nd Street, Suite 1136
New York, NY 10165
Phone: 212-399-7128
Fax: 212-399-7144

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"SERVING AMERICA'S GLOBAL BUSINESSES SINCE 1914"

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For membership opportunities, please contact us at nftcinformation@nftc.org or 202-887-0278.